



Constitutional Law - Draft Card Burning - Symbolic Expression Not in Public Interest

Alan Sobel

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Alan Sobel, *Constitutional Law - Draft Card Burning - Symbolic Expression Not in Public Interest*, 16 DePaul L. Rev. 485 (1967)
Available at: <https://via.library.depaul.edu/law-review/vol16/iss2/14>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapiientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapiientiae. For more information, please contact digitalservices@depaul.edu.

intendment of respondeat superior, rather than to subserve the ends of formal logic.

Jeffrey Cole

CONSTITUTIONAL LAW—DRAFT CARD BURNING—SYMBOLIC EXPRESSION NOT IN PUBLIC INTEREST

On October 15, 1965, the appellant, David Miller, burned his draft card while giving a speech at a street rally near the Army Building in Manhattan. The appellant believed the burning of his Notice of Classification to be a symbolic protest against the draft, the military action in Vietnam, and the law prohibiting the knowing destruction or mutilation of draft cards.¹ The trial court convicted Miller for knowingly destroying a Selective Services Notice of Classification. The United States Circuit Court of Appeals affirmed the judgment, holding that the public interest protected by the proper functioning of the Selective Service System, a purpose served by statute making it unlawful to mutilate or destroy a draft card, outweighs any alleged abridgement of freedom of symbolic expression of speech by a registrant's burning of his draft card. *Miller v. United States*, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, No. 851, U.S., February 13, 1967.

The *Miller* case is significant because it is the first case to interpret the 1965 amendment of section 12(b)(3) of the Universal Military Service and Training Act which prohibits the knowing mutilation or destruction of draft cards. The purpose of this note is to analyze the constitutionality of the amendment in light of the guarantees of freedom of expression as embraced by the first amendment. In this analysis, the purpose of the amendment and the character of the act of destroying a draft card as symbolic speech will be discussed. It will then be possible to consider whether Congress may, under the pretense of its power to raise and support armies suppress a form of dissent hostile toward national policy.

It was contended by the appellant that section 12(b)(3) of the Universal Military Service and Training Act, as amended in 1965, under which he was convicted, was unconstitutional. The reasons posited for the alleged unconstitutionality were: (1) that the statute is unconstitutional on its face because its legislative history establishes that it was enacted deliberately, and for the purpose of suppressing dissent; (2) it is unconstitutional as ap-

¹ Universal Military Training and Service Act, § 12(b)(3), 62 Stat. 604 (1948), 50 U.S.C. App. § 462(b)(3) (1965). "Any person . . . (3) who forges, alters or knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon . . . (6) [shall], upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years or both."

plied to the facts in the case at bar because the appellant's conduct sought to be punished was symbolic speech protected by the first amendment; and (3) under the fifth amendment, the 1965 amendment is unconstitutional because it serves no rational legislative purpose. These issues will be developed in the order in which they were raised.

The first contention is that the statute in question is unconstitutional because an examination of the collective legislative intent would reveal that the statute was enacted for the sole purpose of suppressing dissent. The appellant's interpretation of the legislative purpose is not without some justification. The sponsor of the 1965 amendment, the Honorable Mr. Mendal Rivers of South Carolina, had stated before Congress: "The purpose of the bill is clear. . . . It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in mass destruction of draftcards. . . . [I]f it can be proved that a person knowingly destroyed or mutilated his draft card, he can be sent to prison where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government."² Clearly, the motivation for the enactment of the amendment was prompted by prior burnings of draft cards occurring during demonstrations against the policy in Vietnam, and its purpose was, as suggested, to suppress this particular form of dissent. However, it was held in a recent case, that although adoption of a law was prompted by the conduct and action of the defendants in that case, it was constitutional and not stricken as discriminatory or invalid because of its motivation.³

The holding in that case was not novel. The Supreme Court has repeatedly stated: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate . . . which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."⁴ More succinctly put, this means inquiry into "hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."⁵ Therefore, as long as Congress acts in pursuance of its constitutional power,

² 111 CONG. REC. 19135 (daily ed., Aug. 10, 1965).

³ *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734 (1963), *appeal dismissed* 375 U.S. 42 (1963). The case involved a bizarre display of offensive objects on a clothes line in a residential area to protest high property taxes. Subsequently, the City of Rye enacted an ordinance which, in effect, prohibited clothes lines in a front or side yard abutting a street. The defendant was convicted for violation of the ordinance and the New York Court of Appeals said: "It is a fair inference that adoption of the ordinance before us was prompted by the conduct and action of the defendants but we deem it clear that, if the law would otherwise be held constitutional, it will not be stricken as discriminatory or invalid because of motivation." (*Id.* at 466, 240 N.Y.S.2d at 736).

⁴ *McCulloch v. Maryland*, 17 U.S. 316, 320 (1819).

⁵ *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937).

"the Judiciary lacks authority to intervene on the basis of motives which spurred the exercise of that power."⁶ The remedy for an abuse of power, as may be indicated in the instant case "lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."⁷ The cases in accord are legion.⁸

It is apparent then, that judicial inquiry is at an end, provided that Congress has the constitutional authority to legislate in a field, so long as the statute in question does not infringe a constitutional right on its face. Under article I, section 8 of the Constitution, Congress is given the power to "raise and support armies." The Universal Military Service and Training Act and its 1965 amendment are clearly embraced by this power. There is no question presented, however, as to whether Congress has the power to conscript an army.⁹

If the first argument is to have any meritorious weight, it must rest upon the collateral contention that the statute is not narrowly drawn on its face, and consequently discriminates between card burning as protest and some other purpose unrelated to symbolic speech. The argument here also fails. The duty to keep on one's person selective service certificates is an issue settled many years ago and it is not contended that this requirement was directed at suppressing dissent.¹⁰ The 1965 amendment punishing one who wilfully and knowingly mutilates or destroys his draft card is a natural corollary to the regulation requiring the registrant to have in his possession his registration certificate at all times, since one who destroys his draft card cannot have it in his possession.¹¹ If the Congressional motives are not argued for the applicable statute concerning

⁶ *Barenblatt v. United States*, 360 U.S. 109, 132 (1959).

⁷ *McCray v. United States*, 195 U.S. 27, 55 (1904).

⁸ *Sonzinsky v. United States*, *supra* note 5. See also *Barenblatt v. United States*, *supra* note 6; *United States v. Kahriger*, 345 U.S. 22, 27 (1953), allegation that improper motive was revealed in legislative history; *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949).

⁹ *Selective Draft Law Cases*, 245 U.S. 366 (1918). See also *Lichter v. United States*, 334 U.S. 742, 756 (1948) wherein the Court stated: "The constitutionality of the conscription of man power for military service is beyond question."

¹⁰ *United States v. Kime*, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951), registrant claimed that religious belief motivated him not to carry his registration certificate.

¹¹ Under the authority delegated to him by Congress in the Universal Military Service and Training Act § 10(b)(1), *supra* note 1, the President promulgated a regulation requiring those who have been classified by a local board to have in their possession at all times the Notice of Classification (SSS Form No. 110) except when entering upon active duty into the Armed Forces, when it must be surrendered. 32 C.F.R. § 1623.5 (1962). Violation of this regulation was made a felony by § 12(b)(6) of the same Act.

wilful nonpossession, there would seem to be even less justification for examining the Congressional motives for the 1965 amendment. Therefore, if any constitutional infirmity is to be found, it is not on the face of the 1965 amendment.

The second argument is that the statute, as applied in the instant case, is an unconstitutional suppression of speech. The predication of the argument is that the burning of the draft card, taking into consideration the attendant circumstances, was a form of symbolic speech. Such acts as picketing,¹² civil rights sit-ins,¹³ and flag salutes¹⁴ have been held to be symbolic speech and embraced by the protection of the first amendment. However, the first amendment does not protect all forms of symbolic speech.¹⁵ In the case at bar, the court did not reach a judicial determination as to whether the conduct complained of was a protected exercise of free speech, but assumed it arguendo so as to determine whether there were grounds for its regulation. The appellant agreed that protected free speech might be regulated, but insisted that the test to be applied was the clear and present danger test expounded in *Schenk v. United States*.¹⁶ It was properly found that the appellant was errant in his insistence upon the clear and present danger test, as the more recent decisions of the Supreme Court have indicated that a balancing of interest test is the better approach to determine the constitutionality of legislation which indirectly restricts free speech. The balancing test which governs is best stated as:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.¹⁷

¹² *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹³ *Garner v. Louisiana*, 368 U.S. 157, 201-02 (1961). *Accord*, *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

¹⁴ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), wherein it was held that a compulsory flag salute was symbolic speech and to require the salute would be a violation of the first amendment right to refrain from expression.

¹⁵ In *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), it was recognized that free speech protection does not extend to picketing intertwined with acts of violence.

¹⁶ 249 U.S. 47, 52 (1919). The test is: "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

¹⁷ *American Communications Ass'n., CIO v. Douds*, 339 U.S. 382, 399 (1950), wherein the court held that the statute requiring union officials to file a non-communist affidavit as a condition of using the services of the National Labor Relations Board was not violative of the first amendment.

The more recent decisions of the Court are in accord and require its application where a narrowly drawn statute regulates conduct on its face, and not the communication of ideas.¹⁸ It may be stated, then, that general regulatory statutes which are not intended to control the content of speech, but which incidentally limit its unfettered exercise, are not regarded as the types of laws the first amendment prohibited Congress to pass, provided that the law in question has been found justified by subordinating valid governmental interests; a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

The balancing test being ascertained as the proper approach, the inquiry must now necessarily turn to the determination of the government interest involved and the effect of the 1965 amendment on freedom of expression. The public interest involved is the proper functioning of the Selective Service System, and the orderly operation of the draft is admittedly an interest requiring protection, even when that interest is in conflict with first amendment liberties.¹⁹ In attempting to ascertain how the statute facilitates the end desired—the orderly functioning of the Selective Service System—the weakest argument defending the constitutionality of the 1965 amendment is advanced. It is argued, *inter alia*, that by requiring one to have the Notice of Classification in his possession at all times and by proscribing its mutilation or destruction, it will assist in detecting those registrants attempting to evade their Selective Service obligation; that in case of a national emergency and “call-up”, the registrant could expeditiously provide proof of his fitness at any local draft board; that notice of classification can assist a local draft board to reconstruct files destroyed by fire or other disaster;²⁰ and that the information on the card facilitates communication with the registrant’s local draft board. The last reason posited, and the most effective, is that the proper functioning of the Selective Service System depends upon the aggregated consequences of individual acts. It may be argued that the burning of a few draft cards, perhaps even a few hundred, will not impair the orderly operation of the Selective Service System, but the fallacy is apparent. As the Supreme Court stated in *Wickard v. Filburn*, a case involving the regulation of

¹⁸ See *Konigsberg v. State Bar*, 366 U.S. 36, 49–51 (1961); *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 91 (1961). See also *Barenblatt v. United States*, *supra* note 6, at 126–27; *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *United States v. Aarons*, 310 F.2d 341, 345 (2d Cir. 1962).

¹⁹ See *United States v. Kime*, *supra* note 10; *United States v. Mohammed*, 288 F.2d 236, 244 (7th Cir. 1961) *cert. denied*, 368 U.S. 820 (1961); *United States v. Miller*, 233 F.2d 171 (2d Cir. 1956) (*per curiam*).

²⁰ Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment*, 32 BROOKLYN L. REV. 303 (1966).

wheat production by way of the commerce clause, "That [appellant's] own contribution . . . may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."²¹ Hence, the assumption is that the conduct complained of here may potentially become multiplied manifold, and if so, the orderly functioning of the draft is bound to be impeded. However, the court was reluctant to illuminate on how the system would be actually impaired if the sight of dissident students burning their Notice of Classification becomes as common as the automobile, leaving the contemplation of the consequences to conjecture.

To rebut the arguments advanced, it is significant to note that a registrant is no more prone to forget his classification than his telephone number, and the address of his local draft board may be readily found in the telephone directory. The Selective Service number assigned to the registrant may be found on his certificate of registration (which is required in all correspondence with the draft board) as well as the number assigned to his draft board by which it is identified. In the event of a national emergency, the authorities can rapidly ascertain the status of a registrant through his local board. What would be the effect, then, of appellant's conduct, if multiplied manifold, upon a public interest which the government has a right to protect? The answer is probably to be found, initially at least, in the political arena relating to respect for the "System". If such respect is lacking, it could foreseeably touch upon the harmonious, efficient and effective operation of the draft. If registrants have no inhibitions to publicly destroy their draft cards, an illegal act, it may be opined that more serious violations of the laws relating to the draft are encouraged and that this conduct may be severely detrimental to the morale of the fighting men in the armed forces who are engaged in the present grotesque realities of war. While an argument such as this is manifestly weak in judicial precedent, its notion is not altogether without recognition from the Bar. As Justice Holmes noted in the unanimous opinion in *Schenk v. United States*:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.²²

This principle is no less applicable to conduct offered as symbolic speech than it is to the uttered word. It would appear, then, that the government has a legitimate interest involved under article I, section 8 of the Constitution.

²¹ 317 U.S. 111, 127-28 (1942).

²² *Supra* note 16, at 52.

Against the reasons posited for establishing a legitimate public interest which the 1965 amendment serves, it now remains to weigh the effect of the statute upon the freedom of expression allegedly encroached. At the outset, it should be recalled that the statute is narrowly drawn and regulates a limited form of conduct, whether or not that conduct is intended as an expression of speech. Notwithstanding the destruction of draft cards, the statute in no way prohibits speech, communicated in any manner desired, dissenting to the draft, the law itself or to the military action in which this country is currently involved. It is claimed that the burning of draft cards is more dramatic and effective than mere speech, and that one has a right to the most effective means of communication. Upon examination of the minor premise of this syllogism, it is found pregnant with fallacy. Certainly one may not blow up the Statue of Liberty or the Washington Monument because it most effectively expresses a disapproval of a law or policy. It may be argued, however, that these are violent acts or expressions, which the burning of draft cards is not. This distinction also has its limitations. In *Kovacs v. Cooper*,²³ the court affirmed a conviction under an ordinance forbidding the use on public streets of sound trucks or any other instrument which emitted "loud and raucous" noise against a claim that the statute unconstitutionally abridged freedom of speech.²⁴ The *Kovacs* and instant case are similar in that there was no restriction placed upon the communication of ideas, but merely a partial restriction on the methods which may be used to communicate them. This, of course, does not imply that availability of other means of communication justifies a suppression of any one of them, but that where symbolic speech is involved, it is a relevant consideration. At this point it may be safely concluded that freedom of speech is not absolute in that it must prevail when the constitutional protection exists,²⁵ and also that protected rights are not confined to verbal expression. For example, the right of freedom of speech embraces "appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence."²⁶ If the 1965 amendment proscribed a form of pure speech, there might be a stronger argument for its unconstitutionality, but pure speech and conduct offered symbolically as speech are not treated as the same nor entitled to the same liberties under the first amendment. It was held in *Cox v. Louisiana*²⁷ that the first amendment does not afford the same kind of freedom to those who would communicate ideas by conduct, such as marching and picketing on streets and highways, as the amendment affords to those

²³ 336 U.S. 77, 88-89 (1949).

²⁴ *Ibid.*

²⁵ *Supra* note 18.

²⁶ *Supra* note 13.

²⁷ 379 U.S. 536 (1965).

who communicate by pure speech.²⁸ This reasoning was predicated upon the declaration in *Giboney v. Empire Storage and Ice Co.*²⁹ in which it was explained that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."³⁰ It will be recalled that the appellant burned his draft card while giving a speech at a street rally, and it appears from the facts in the instant case that it is within the scope of the principle enunciated in *Giboney*.

The final argument asserted is that the statute does not serve any rational legislative purpose and is therefore an unconstitutional deprivation of individual liberty without due process of law under the fifth amendment. Some have urged that it would have been wiser for Congress to have placed a service charge for obtaining a new card when one burned or otherwise intentionally mutilated his original. It is argued that a reasonable service charge would have put the same act in its proper perspective and probably fewer burnings would have happened.³¹ It is also pointed out that the 1965 Amendment has been called "a silly law" in a national periodical with extensive circulation.³² While it may in fact be proven, in retrospect, that the statute is unwise, it is not the province of the judiciary to so determine; for on this point, judicial inquiry is at an end when it is ascertained that Congress has the power to enact the statute.

Thus, it is seen in *Miller v. United States* that the 1965 Amendment to section 12 (b) (3) of the Universal Military Services and Training Act of 1948 is not unconstitutional. The court held that it was not the function of the judiciary to go behind the statute to glean the collective legislative motive or to pass judgment upon the wisdom of the enactment. Even assuming, arguendo, that the burning of the draft card is symbolic speech, "it is the effective and efficient operation of the Selective Service System, not the . . . right to use this particular form of communication which is entitled to the protection of the law."³³ This conclusion is reached by applying the balancing test as expounded in *American Communications Ass'n., CIO v. Douds*³⁴ which permits regulation in the interest of public order where the regulation results in an indirect and minimal abridgment of speech, and where the former demands the greater protection under the particular circumstances presented. It may be that the amendment to

²⁸ *Id.* at 555.

²⁹ 336 U.S. 490 (1949).

³⁰ *Id.* at 502.

³¹ Rachlin, *Draft Cards and Burning the Constitution*, 32 BROOKLYN L. REV. 334 (1966).

³² Wainright, *A Serious To-Do About a Silly Law*, Life, March 4, 1966, p. 17.

³³ *United States v. Smith*, 249 F. Supp. 515, 518 (S.D. Iowa 1966).

³⁴ *Supra* note 17.

section 12 (b) (3) will prove silly and unwise, and demonstrate itself to be the product of passion which seeks to suppress the voice of dissent. But the *Miller* case made it manifestly clear that redress will not be found in the courts. If any relief from the allegedly oppressive law is to be forthcoming it will be through the process of the ballot box and the pressures of public opinion.

Alan Sobel

CRIMINAL LAW—CHRONIC ALCOHOLISM AS A DEFENSE TO PUBLIC INTOXICATION STATUTE

Defendant, Easter, was accused of violating a criminal public intoxication statute in the District of Columbia.¹ His defense was chronic alcoholism, and he presented evidence that he had been consuming alcoholic beverages intemperately for over thirty years and had been previously arrested for the same offense approximately seventy times. Easter was found guilty in the trial court, and the conviction was affirmed by the Court of Appeals for the District of Columbia.² The United States Court of Appeals reversed, holding that chronic alcoholism, though not amounting to insanity, is a defense to the crime of public intoxication. *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966).

The ruling that chronic alcoholism is a defense to the crime of public intoxication represents a change from the still prevailing common law which does not recognize chronic alcoholism not amounting to insanity as a defense. The only other jurisdiction which has adopted this view is the Fourth Circuit in the case of *Driver v. Hinnant*,³ a habeas corpus proceeding involving the same issues. It will be the purpose of this note to trace the development of intoxication as a defense to the crime of public intoxication and to analyze the reasoning followed by the court in breaking with the common law and the overwhelming majority of states. This paper will not attempt to explore the legal ramifications of the possibility of extending the defense.

Intoxication as a defense to a crime may be divided into three areas: (1) involuntary intoxication, (2) voluntary intoxication and (3) chronic alcoholism. Involuntary intoxication has long been recognized, even at common law, as a defense to a crime.⁴ It has repeatedly been held that where one becomes intoxicated without his consent, through the force or fraud

¹ D.C. CODE ANN. 25-128 (1961). "(a) No . . . person shall [in the District of Columbia] be drunk or intoxicated in any street, alley, park, or parking."

² *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

³ 356 F.2d 761 (4th Cir. 1966).

⁴ *Bartholomew v. People*, 104 Ill. 601 (1882); *Carter v. State*, 12 Tex. 250 (1854); *Choate v. State*, 19 Okla. Crim. 169, 197 Pac. 1060 (1921).